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Phoenix, Arizona 85007

Robert R. Corbin

September 2, 1981

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ARIZONA ATTORNEY GENERAL

INTERAGENCY

Mr. Michael J. O'Haco  
Chairman  
Arizona Racing Commission  
1645 West Jefferson  
Phoenix, AZ 85007

Re: I81-100 (R80-108)

Dear Mr. O'Haco:

You have stated that, in 1978, the Arizona Racing Commission approved Prescott Downs' request to withhold \$100,942.58, pursuant to A.R.S. § 5-111.02<sup>1</sup>, for construction of horse stalls and purchase of a water truck and tractor. In connection with this withholding of funds, you have posed the following questions:

1. May a tractor and water truck be classified as capital improvements under A.R.S. § 5-111.02?
2. If the answer to question 1, above, is "no", should the State recover the funds thus far withheld by Prescott Downs for either the water truck and tractor or the horse stalls?

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1. A.R.S. § 5-111.02 provides, in pertinent part: "To encourage the improvement of racing facilities for the benefit of the public, breeders, and horse owners, and to increase the revenue to the state from the increase in pari-mutuel wagering resulting from such improvements, the percentage paid by a permittee to the state. . . . shall be reduced by one per cent of the total amount wagered for those permittees who make capital improvements to existing race tracks and such amount shall be paid to the permittees making such capital improvements. . . ."

3. May Prescott Downs continue to withhold a percentage of the daily handle, pursuant to A.R.S. § 5-111.02.A, until it has been reimbursed for the aforementioned improvements?

With respect to your first question, in determining whether a tractor and water truck may be classified as capital improvements, we must consider the definition of that term set forth in A.R.S. § 5-111.02.D. A.R.S. § 5-111.02.D defines "capital improvements" as:

an addition, replacement, or remodeling of a race track facility involving an expenditure of at least one hundred thousand dollars. Capital improvement does not include the cost of ordinary repairs and maintenance required to keep a race track facility in ordinary operating condition. (Emphasis added.)

A "water truck" is used, not to "add, replace or remodel" a race track facility, but rather to moisten the track between races in order to decrease ambient dust. Similarly, a "tractor" is used between races to harrow the track and break up dirt clods. These pieces of equipment, serving only to keep the race track facility in ordinary operating condition, are therefore specifically excluded from the term "capital improvement" as defined by A.R.S. § 5-111.02.D.<sup>2/</sup>

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2. Regardless of the meaning that the term "capital improvements" may have in other contexts, the above-referenced statutory definition must determine the answer to your first question. In Sisk v. Arizona Ice and Cold Storage Co., 60 Ariz. 496, 501, 141 P.2d 395, 397 (1943), our Supreme Court stated:

Where words are defined in a particular statute, and it is clear that the legislature intended to give to such words a different meaning than the one generally and ordinarily given to such words, the statutory definition is the one to be applied.

This same principle has been expressed in numerous cases. See, for example, Enloe v. Baker, 94 Ariz. 295, 298, 383 P.2d 748, 750 (1963), and Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947).

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Your second question is, assuming that a tractor and water truck do not qualify as "capital improvements" within the meaning of A.R.S. § 5-111.02, whether the State should recover funds thus far withheld by Prescott Downs for those items. The answer to this question is that Prescott Downs has an obligation to repay, and the State has an obligation to recover, the funds in question. Regardless of any "approval" that was previously granted for Prescott Downs to withhold those funds, such withholding is unauthorized by statute. When public funds are incorrectly paid or withheld, they may be recovered upon discovery of the error. The Arizona Supreme Court has declared (in a suit brought by Gila County to recover money incorrectly paid for travel expenses):

It is undoubtedly true, both as a matter of statute and as a matter of common law, that when any person receives from the state or county treasury money to which he is not entitled as a matter of law, that he immediately becomes indebted to the state or county in the amount which he has thus illegally received. If thereafter the state or county should endeavor to release the parties from the debt, it is clearly a donation of the amount of his indebtedness to such individual, which, under section 7, Article 9 of the Constitution, is forbidden.

Puterbaugh v. Gila County, 45 Ariz. 557,  
564, 46 P.2d 1064, 1067 (1935).

When the Governor of Arizona, by proclamation, authorized the Tax Commission to incur debts up to \$25,000 to defend certain lawsuits, the Commission employed special counsel at \$50 a day to assist the Attorney General's office and experts at \$20 a day to gather evidence. However, the State Auditor refused to pay claims submitted by the special counsel and by an expert, on the basis that the Governor's proclamation was invalid. In that case the court, referring to Section 5 of Article 9 of the Constitution of Arizona, which provides:

No money shall be paid out of the state treasury, except in the manner provided by law.

noted that similar provisions, in other state constitutions, have universally been interpreted to mean that the people's money may not be expended without

their consent either as expressed in the organic law of the state or by constitutional acts of the legislature appropriating money for a specified purpose. . . The rule is so well known and so generally accepted that no further citations are needed to support it.

Crane v. Frohmiller, 45 Ariz. 490, 495-96, 45 P.2d 955, 958 (1935).

The Court held that the law authorizing emergency proclamations to cover expenses of tax suits was unconstitutional and that, consequently, although the Legislature had been aware of the Governor's proclamation and apparently believed that he had authority to issue it, no claim could be paid pursuant to that proclamation for services previously rendered to the State. See also Murphy v. State, 65 Ariz 338, 181 P.2d 336 (1947), in which the Supreme Court said that the State could not be estopped to deny its deed against the bona fide mortgagee of its grantee when it incorrectly deeded certain property<sup>3/</sup>.

The foregoing authorities establish that, if items such as a water truck and tractor were erroneously approved, the State may and should recover the funds withheld for such items: any use of public funds in a manner unauthorized and indeed specifically prohibited by the Legislature is improper and such funds should be repaid to the State.

According to your letter, the total amount of "improvements" for which approval was granted came to \$100,942.58. Of this amount, the cost of the tractor and water truck comprised \$38,921.86. The question therefore arises whether funds may be withheld for the remaining improvements, totalling \$62,020.94, since the definition of "capital improvements" in A.R.S. § 5-111.02.D requires that, in order to qualify as a "capital improvement", an "addition, replacement or remodeling of a race track facility" involve "an expenditure of at least one hundred thousand dollars." Information communicated in your letter indicates that the otherwise approvable portion of Prescott Downs' additions, replacements or remodeling of its race track facility may fail to qualify as a "capital improvement" because it does not involve an expenditure of at least \$100,000.

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3. Murphy v. State was recently cited with approval by the Montana Supreme Court, when that court announced a similar holding. Norman v. State, 597 P.2d 715, 719 (Mont. 1979). See also State v. Shull, 279 P.2d 339 (Okla. 1955); Aebli v. Bd. of Ed., 146 P.2d 601 (Cal. 1944).

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In answer to your third question, then, Prescott Downs should not continue to withhold any funds for reimbursement of the water truck and tractor. It should also refrain from withholding any funds for reimbursement of the other improvements until you have determined if the total amount of the "capital improvements" undertaken by Prescott Downs involve an expenditure of at least \$100,000.

Sincerely,

*Bob Corbin*

BOB CORBIN  
Attorney General

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